The negligence charged in the third, fourth, fifth, and sixth counts of the declaration not being proved, the jury could not have properly found in favor of the plaintiff on these counts. It is therefore unnecessary to consider the questions raised as to the correctness of the court's action in giving and refusing instructions, since it is the well-settled rule of this court, recognized and acted upon in numerous cases, that if the court can see from the whole record that under correct instructions a different verdict could not have been rightly found, or that the party complaining could not have been prejudiced by the action of the court in giving and refusing instructions, it will not for such errors reverse the judgment and set aside the verdict. *Leftwich* v. *Richmond,* 100 Va. 164, 40 S. E. 651; *Brock* v. *Bear,* 100 Va. 562, 42 S. E. 307.

We are of opinion that there is no error in the judgment complained of to the prejudice of the plaintiff, and it should be affirmed.

Affirmed.

LANE BROS. & CO. v. BAUSERMAN.

Supreme Court of Appeals of Virginia.

November 23, 1904.

[48 S. E. 857.]

PROCESS—WAIVER OF DEFENSE—LIMITATION OF ACTIONS—RULINGS ON DEMURRER—INJURIES TO EMPLOYEES—DANGEROUS PLACE FOR WORK—ADMISSION OF EVIDENCE—QUALIFICATIONS OF EXPERT WITNESS—DISCRETION OF COURT—OPINION EVIDENCE—HARMLESS ERROR.

1. A motion to quash the writ and summons on the ground that the action is barred by limitations is a waiver of all defects in the writ and return.
2. The question whether the action is barred by limitations cannot be raised by motion to quash.
3. Code, sec. 3271, as amended by Acts 1899–1900, p. 111, c. 100 (2 Code 1904, p. 1721), provides that in civil cases the court, on motion of either party, or of its own motion, may require the grounds of demurrer relied on to be stated specifically, and no grounds shall be considered other than those so stated. *Held,* that a ruling on a demurrer, which is not copied in the record, will not be reviewed.
4. In an action for injuries resulting from an explosion while plaintiff was drilling a hole in a rock in ignorance of the fact that a blast had been placed in the hole and had failed to explode, evidence was admissible that defendants' foreman said, in the presence of plaintiff when set at work, that the hole was all right.

5. In an action for injuries received while cleaning out a drill hole in a rock in which a blast had failed to explode, evidence tending to show that defendants' foreman had knowledge of the dangerous condition of the hole when he set plaintiff at work was admissible.
6. In such case, evidence that when plaintiff was set to work there was no notice posted showing that the hole was loaded was admissible, at least to rebut the idea that plaintiff was guilty of negligence in working at the hole in its dangerous condition.
7. The qualification of a witness to testify as an expert being largely in the discretion of the trial court, his admission of such testimony will not be reversed unless it clearly appears that the witness was not qualified.
8. As a general rule, asking a leading question cannot be assigned as error, as the circumstances under which it may be asked are in the discretion of the trial court.
9. Error in asking the opinion of a witness on a matter on which expert evidence is inadmissible is harmless where the answer to such question is a matter of common knowledge.
10. Where the declaration in an action for personal injuries while plaintiff was working with defendants' "steel gang" at a stone quarry alleged that the injuries were caused by the "carelessness, negligence, incapacity, and want of skill on the part of defendants, their agents and employés who had charge of the quarry and works of defendants," refusal to allow defendants' superintendent to answer the question, "Did you assign to the 'steel gang' any but experienced men?" was error.
11. In an action for injuries received while working in defendants' stone quarry, alleged to have resulted from the dangerous condition of the place, refusal to allow defendants' superintendent to state the condition of the quarry on the day of the accident was error.

Appeal from Circuit Court, Shenandoah county.

Action for personal injuries by John W. Bauserman against Lane Bros. & Co. From a judgment for plaintiff, defendants appeal.

Reversed.

M. L. Walton and *H. H. Downing,* for appellants.

R. T. Barton and *Tavenner & Bauserman,* for appellee.

BUCHANAN, J.

John W. Bauserman instituted his action of trespass on the case against John E. Lane and others, doing business as partners under the firm name of Lane Bros. & Co., to recover damages for personal injuries suffered by him while working in the defendants' rock quarry, and alleged to have been caused by their negligence.

Upon the calling of the cause the defendants appeared, and mov-

ed the court to quash the writ or summons. This motion was overruled, and the defendants excepted. This action of the court is assigned as error.

The bill of exception states that the grounds of the motion were, because the summons and return thereon were not in accordance with law, and that more than one year had elapsed between the time the plaintiff was injured and the institution of the action. One of the grounds of the motion to quash was in bar of the action, being, in effect, a plea of the statute of limitations, and was, therefore, a waiver of all defects in the process and return thereon.

It is well settled that, if process be illegally issued or executed, the validity of such process or return can be raised by a motion to quash, as well as by a plea in abatement. See *Garrard* v. *Henry,* 6 Rand. 112, 116; *Pulliam* v. *Aler,* 15 Gratt. 54, 62; *Warren* v. *Saunders,* 27 Gratt. 259, 268; *Raub* v. *Otterback,* 89 Va. 645-649, 16 S. E. 933; *N. & W. Ry. Co.* v. *Carter,* 91 Va. 587, 22 S. E. 517; 1 Rob. Pr. (old ed.) 162; 4 Min. Inst. (1st ed.) 532. But, if such motion be not made and disposed of before appearing to the action, or before taking or consenting to a continuance, the party is held to have waived all defects in the process and service thereof. *Wynn* v. *Wyatt's Adm'x,* 11 Leigh. 584, 590-595; *Pulliam* v. *Aler, supra; Harvey* v. *Skipwith,* 16 Gratt. 410, 414; *Petty* v. *Frick,* 86 Va. 501, 503, 10 S. E. 886; *New River Min. Co.* v. *Painter,* 100 Va. 507, 42 S. E. 300.

Even if the action had been barred by the statute of limitations, that question could not be raised by a motion to quash the process. The motion to quash was, therefore, properly overruled.

The defendants demurred to the declaration and each count thereof. The demurrer was overruled, and this action of the court is assigned as error.

The grounds of the demurrer were set forth in writing, and filed, as required by counsel and the court; but that paper is not copied into the record, and it does not appear what the grounds of demurrer were.

Section 3271 of the Code, as amended by an act of assembly approved January 22, 1900 (Acts 1899-1900, p. 111, c. 100; 2 Code 1904, p. 1721), provides, among other things: "That all demurrers shall be in writing, except in criminal cases, and in civil cases the court on motion of any party thereto shall, or of its own

motion may, require the grounds of demurrer relied on to be stated specifically in the demurrer, and no grounds shall be considered other than those so stated; but either party may amend his demurrer by stating additional grounds, or otherwise, at any time before the trial."

Since the trial court could not consider any ground of demurrer other than those stated specifically, and as they are not copied into the record, this court will treat the case as if there had been no demurrer; otherwise it might reverse the trial court upon a ground of demurrer not stated specifically before the trial, and which that court had no right to consider under sec. 3271 of the Code, as amended. It may not be amiss to say that the amendment to sec. 3271 is an eminently wise one, and, if taken advantage of by the trial courts, will do away with the practice of assigning one ground of demurrer in the trial court and relying upon a wholly different ground in the appellate court—a practice which frequently results in the reversal of trial courts upon questions never presented to or considered by them.

Upon the trial of the cause, Bott, one of the plaintiff's witnesses, was asked, "Just state how the accident occurred," and answered, "I says to Mr. Fisher, . . . 'Joe, has that hole gone off?'.and Mr. Fisher says, 'Yes, sir,' and walked up to the hole and pulled the wire out." The defendants objected to both question and answer. The court overruled the objection, and this action of the court is assigned as error.

Bott was an eyewitness to the accident, and there was no valid objection to asking him how it occurred. The objection made to the answer is that Fisher's assurances of safety, or his declarations, were not binding on the defendants. Fisher was the foreman in charge of the men known as the "steel gang." His duties were to work along with his men, and to look after them, and when the superintendent was not there (and he was not at the time of the accident) to direct them. In order to understand the objection made to Fisher's answer, it will be necessary to state briefly some of the facts of the case which the evidence tended to prove.

The defendants' rock quarry was located on a very steep hillside, where the stones lay in ledges of different depths, and were gotten out for dimension or building purposes exclusively. The manner of getting them out was by drilling holes with steam or hand drills,

to put a small load or charge of powder in each hole, tamp clay upon the powder, connect a wire with an exploder attached pressed down to the powder, then attach the wires, positive and negative, so as to make a complete circuit, to an electric battery, by which the blasts were set off; the effect of which was to spring the stone and open fissures between the layers. Sometimes, when it was desired to remove more than one layer of stone, an additional charge of powder was placed in the hole corresponding to the layers, and prepared for explosion by the electric battery in the same manner as above described. Eight or ten days before the accident some twenty or more holes had been drilled, all about eight feet deep, and loaded. Three of these holes, near together, had been loaded with two charges in each. When the electricity was applied, the loads in the other holes and five of the six loads in the three holes exploded, leaving one unexploded in the middle hole. The three holes were again loaded, one charge in the middle hole and two in each of the others, and the electricity applied, but the bottom load in the middle hole again failed to explode. For eight or nine days water was poured into that hole to wet the powder, and during that time it rained on the hole. The water disappeared. After waiting this period for the water to do away with the danger of the powder exploding, Fisher, the foreman, who had charge of this work, directed three members of the "steel gang" (the plaintiff being one of them) to clean out the middle hole. While engaged in drilling out the tamping in that hole with a hand churn drill, the undischarged load or charge of powder exploded, injuring the plaintiff and the other two employes engaged in unloading the hole. The plaintiff, who had been working in the quarry most of the time since the August before, testified that until two or three days before the accident he had been absent for a week or more, working his crops at home, was not present when the hole was loaded, knew nothing of the history of that blast nor the condition of the hole when he was directed to aid in cleaning it out; that after he was so directed he saw Fisher pull a wire out of the hole, and heard Bott ask him "if it was all right, and he said, 'Yes, sir; go ahead,' or something to that effect," and that they then commenced to drill out the hole with a churn drill, using water, and getting the dirt out with a swab; and while so engaged the accident occurred.

Ordinarily, where the work directed to be done by the master or

his representative is intrusted to a gang or group of hands, and one of them is selected as foreman or boss to see to the execution of the work, such foreman or boss is a mere fellow servant with the other members of the gang. *Richmond Locomotive Works* v. *Ford,* 94 Va. 627, 642, 643, 27 S. E. 509; *Russell etc. Coal Co.* v. *Wells,* 96 Va. 416, 422, 31 S. E. 614. But if his work relates to duties which are not assignable by the master, then to that extent he may be a vice principal. One of the nonassignable duties of the master is to exercise ordinary care to furnish a reasonably safe place in which his employes are to work.

In this case there is no claim that the quarry in which the plaintiff had been working up to some 10 days before the accident, was not in a reasonably safe condition, considering the dangerous character of the work; but it is insisted that between the time the plaintiff had quit work and gone home and the time of his return, the place at which he was directed to work and was working when injured had been rendered unsafe by what had been done during his absence, which dangerous condition he did not know, and could not have discovered by ordinary care. If this state of facts existed—and there was evidence tending to show that it did—it was the duty of the defendants to inform the plaintiff of the condition of the hole, so far as they knew it, when he was put to work on it. And as neither the defendants nor their superintendent were present, and Fisher was directing the work, he must be regarded as the representative of the defendants in seing that the plaintiff, if he was really ignorant of the danger without fault on his part, was informed of the condition of the hole so far as the defendants knew, or, in the exercise of ordinary care, ought to have known, it. This being so, the statement of Fisher, in the presence of the plaintiff, as to the condition of the hole, was admissible in evidence.

Assignments of error based upon bills of exceptions Nos. 3, 4, and 5 may be considered together. The answers of certain witnesses were permitted to go to the jury over the defendants' objection for the purpose of showing Fisher's knowledge of the dangerous condition of the hole when he directed the plaintiff, with others, to clean it out, and for that purpose only. The answers in question showed that the witnesses refused to work at the hole when Fisher directed them to do so, because they regarded it as dangerous, and so informed Fisher. The evidence objected to tended to show that Fisher

had knowledge of the condition of the hole when he directed it to be cleaned, and, so limited, was properly admitted.

The plaintiff, when examined as a witness, was asked, over the defendants' objection, "What was the appearance of the hole and rock when you were sent up there to work at it?" to which inquiry he replied, "I saw Mr. Fisher pull out a wire, and I heard Mr. Bott ask him if it was all right, and he said 'Yes,' or something to that effect." The action of the court in permitting that answer to go to the jury is assigned as error.

The evidence was admissible for the reasons stated in disposing of the assignment of error based upon the second bill of exceptions.

Jenkins, one of the plaintiff's witnesses, was asked, "Was there any device of any sort—any placard or anything stuck in the hole —to show that it was loaded?" to which inquiry he answered, "No, sir." This evidence was admissible, if not to show negligence on the part of the defendants in failing to give warning of the condition of the hole at least to rebut the idea that the plaintiff was guilty of contributory negligence in working at the hole in the face of such a danger signal.

The assignments of error based upon bills of exception numbered 8 and 9, may be considered together, as they both relate to the action of the court in permitting certain witnesses to testify as experts. The objection made to their evidence is, that it was not shown that they had such knowledge as entitled them to testify as experts upon the subject upon which they were examined.

It appeared that the witnesses in question had been engaged in stone quarries, drilling holes and blasting, for many years—one for 16 or 17 years, and the other for 12 or 15 years—and that they had considerable experience in unloading unexploded blasts, and knew the proper method of doing that work, though neither claimed to know what was the method in general use. The question of their qualification to speak as experts was largely in the discretion of the trial court, and it will not be reversed for allowing witnesses to testify as experts unless it clearly appears, as it does not in this case, that they were not qualified. *Richmond Locomotive Works* v. *Ford, supra.*

The case above cited is relied on by the defendants to sustain their contention, but in that case the trial court permitted the plaintiff

to prove, not, as in this case, the proper manner of doing the work in question, but how the work was done in a particular shop.

One of the plaintiff's witnesses was asked, "Is it safe and proper for a man to drill out a hole who does not know that a load was in it?" to which he answered, "No." This question and answer were objected to upon the ground that the question was leading, and that it sought the opinion of the witness upon a subject upon which expert evidence was not competent.

The question is leading, but, as a general rule, such questions cannot be assigned as error, since the circumstances under which they may be asked is in the discretion of the trial court. *Richmond & P. Electric Ry. Co.* v. *Rubin,* 102 Va. ——, 47 S. E. 834, 837. The question did seek the opinion of the witness upon a matter upon which expert evidence was not admissible, and was, therefore, improper; but no injury could have resulted to the defendants from the answer, since it is a matter of common knowledge that it is not safe for any one to drill out a hole loaded with powder when ignorant of the fact that it is so loaded.

The assignments of error based upon bills of exception numbered 11 and 12 are to the refusal of the court to permit the superintendent of defendants' quarry to answer the following questions: "Did you assign to the steel gang any but experienced men?" and "What was your rule in selecting men for that steel gang?" The court properly refused to allow the last question to be answered.

The first count in the declaration charges that plaintiff's injuries were caused by reason of the carele sness, negligence, incompetency, and want of skill on the part of the defendants, their agents and employes, who had charge of the quarry and works of the defendants. The second count charges that Fisher, the boss and foreman of the steel gang, was "without ordinary competency, care, prudence, and skill in and for the performance of the duty required of him," etc. The defendants had the right to introduce evidence to meet these charges, and the answer to the first question which the bills of exception state the witness would have made would have tended to show that none but experienced men were selected for the steel gang. The court erred, we think, in not permitting that question to be answered.

The question raised by the thirteenth bill of exceptions was the correctness of the court's action in refusing to permit the superin-

tendent of defendants' quarry to answer the following question, to wit: "Tell us what was the condition of the quarry on the day of the accident." The bill of exception states that it was intended to prove by him that the place assigned the plaintiff was a safe place when he was first assigned there, and that he made it unsafe by his own actions and conduct. This was relevant evidence, and ought to have been admitted.

The plaintiff asked for six instructions to the jury, and the defendants for thirteen. The court gave all of plaintiff's instructions, ten of the defendants' as asked, one as modified by the court, and refused to give the other two. The action of the court in giving the plaintiff's instructions, in modifying one, and in refusing to give two of the defendants' instructions, is assigned as error.

Without attempting any discussion of the many objections made to the court's action, it is sufficient to say that after a careful consideration we think the jury were fully instructed upon the questions they had to pass upon, and that we see no error in the court's action in giving, modifying, or refusing instructions to the prejudice of the defendants.

After the court had instructed the jury as above stated, and during the opening argument of the defendants' counsel, a controversy arose between counsel as to the burden of proof of contributory negligence. Thereupon the plaintiff's counsel tendered an instruction on that subject which the court modified and gave, but did not read it to the jury, as the court thought all the counsel knew the instruction had been given. The instruction was read to the jury in the closing argument of plaintiff's counsel, to which the defendants objected, but the court overruled the objection, and this action of the court is assigned as error.

There is no pretense that the instruction, as modified and given, was erroneous. The plaintiff's counsel had the right to read it in his closing argument. If the defendants' counsel had been misled by what had occurred in reference to the instruction, their remedy was to ask the court to allow them to be further heard upon that subject, and not by objecting to what plaintiff's counsel plainly had the right to do.

The remaining assignment of error is to the refusal of the court to set aside the verdict because contrary to the law and the evidence, and grant a new trial.

As the judgment of the court will have to be reversed for the errors above indicated, and a new trial granted, it is unnecessary to consider that assignment of error. *Reversed.*

NOTE.—The above case presents another exception to the fellow-servant doctrine.

The court recognizes the doctrine that "where the work directed to be done by the master or his representative is entrusted to a gang or group of hands, and one of them is selected as foreman or boss to see to the execution of the work, such foreman or boss is a mere fellow servant with the other members of the gang," but states that, in the absence of the master and superintendent, the foreman or boss must be regarded as the representative of the master.

The other exceptions are stated in *Jones* v. *O. D. Cotton Mills*, 82 Va. 140, as follows:

(1) Where the injury is occasioned by exposing the employee to risks not within his contract of employment; (2) where the negligent employee, whatever his grade or title, exercises supervision or control over the injured employee, principal must answer for the negligent acts of the former whereby the latter is injured without fault on his part; (3) where the principal undertakes to run dangerous machinery with insufficient help, whereby the employee is injured, the principal is liable.

For collection of Virginia cases on fellow-servants, see note to *Edmunds* v. *Venable*, 1 Pat. & H. (Va. Rep. Anno.) 121; see also Rose's Notes on *Railway Co.* v. *Ross*, 112 U. S. 377. G. C. G.